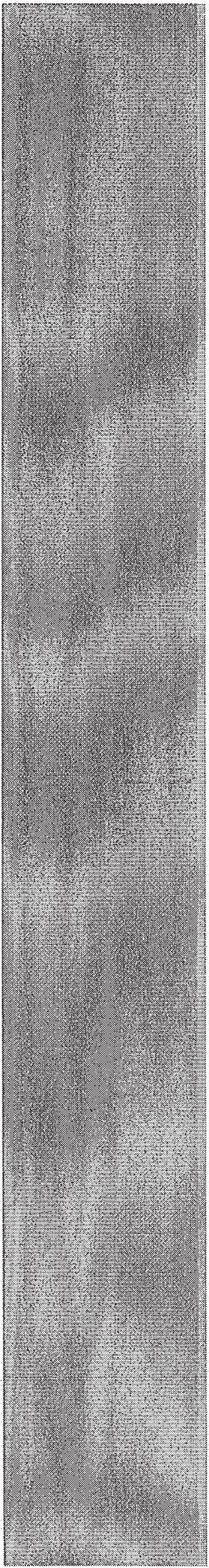


Consent And Disclosure - Additional Issues

- ▶▶ Electronic Consent
 - ▶ FTC Opinion Letters Indicate Compliance with Consent Requirement will Depend on Situation
 - Electronic Signature
 - Other Manifestation of Consent – Hitting Enter, etc.

Consent And Disclosure - Consideration/Fact Act

- ▶▶ Generally Can Make Signing Consent Form a Condition Of Employment/Continued Employment
- ▶▶ FACT Act
 - ▶ Exception To Consent Requirement
 - ▶ Scope Is Unclear

- 
- ▶▶ If the Report Does Not Reveal Any Disqualifying Information, There are No Additional Obligations Except for **Ensuring** that ...
 - ▶ Individuals in Certain States who Requested a Copy of the Report are Provided With a Copy of the Report.
 - ▶▶ If the Report Reveals Disqualifying Information, There are Two More Steps to the Process

Pre-Adverse Action

(3) Conditions on use for adverse actions.

(A) In general. Except as provided in subparagraph (B), in using a consumer report for **employment purposes**, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this title, as prescribed by the

Federal Trade Commission under section 609(c)(3).

Pre-Adverse Action

- ▶▶ Notice Sent Along With
 - ▶ Summary of Rights
 - ▶ Copy of Report
- ▶▶ Best Practice Is For The Notice To Set Forth Basis For Disqualification
 - ▶ Will Discuss Importance Of Employment Application In A Moment

Pre-Adverse Action - State Law Issues

►► Certain States Have State Specific Summary Of Rights Which Must Be Sent

- Massachusetts
- New Jersey
- Washington

Pre-Adverse Action - Additional Issue

- ▶▶ Broad Definition of Adverse Action
- ▶ Arguably includes Denial for Consideration for Promotion, **Denial of Assignment** or Other Employment Benefit

Pre-Adverse Action - Application

- ▶▶ Opportunity Must Be Provided to Contest Accuracy
- ▶▶ FTC Guidance Indicates 5 Days But Does Not Elaborate

Pre-Adverse Action - Application

- ▶▶ If the Individual Does Not Contest the Accuracy of the Report Within 5 Days or Does Contest the Information But is Unable to Present Corrected Information to Sterling or the Client in a Timely Manner, the Client May Take Adverse Action.
- ▶▶ If an Employee Timely Contests the Accuracy of the Disqualifying Information in the Report, We Recommend the Client Provide the Individual With another 5-10 Days to Clarify the Information with Sterling. However, There is Not a Per Se Required Period.

Pre-Adverse Action - Application

- ▶ This is Not an Opportunity for the Individual to Argue that the Client Should Change its Decision – It is Solely to Challenge the Accuracy of the Information on Which the Client Already has Based its Conditional Decision

Pre-Adverse Action - Current Employees

- ▶▶ Can Start Work Subject To Results Of Report
- ▶▶ Can Suspend During Pre-Adverse Action Period
 - ▶ Suspension Can Be Unpaid for Non-Exempt Employees Under Wage And Hour Laws
 - ▶ Potential Issue with Partial Week Unpaid Suspension of Exempt Employee Under Wage and Hour Laws
 - ▶ But Does Punishing With Loss Of Pay During Pre-Adverse Action Period Violate The FCRA?

Adverse Action

§ 615. Requirements on users of consumer reports [15 U.S.C. § 1681m]

(a) Duties of users taking adverse actions on the basis of information contained in consumer reports. If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right

(A) to obtain, under section 612 [§ 1681j], a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 611 [§ 1681i], with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.